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Attorneys for High Speed Rail Authority and  
California Air Resources Board

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

In re:  
PG&E CORPORATION  
- and -  
PACIFIC GAS AND ELECTRIC  
COMPANY,  
Debtors.

Bankruptcy Case  
No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

<input type="checkbox"/>	Affects PG&E Corporation
<input type="checkbox"/>	Affects Pacific Gas and Electric Company
<input checked="" type="checkbox"/>	Affects both Debtors

Date: June 11, 2019  
Time: 9:30 a.m.  
Ctmm: 17  
Judge: Dennis Montali

**OBJECTION OF HIGH SPEED RAIL AUTHORITY AND CALIFORNIA AIR  
RESOURCES BOARD TO DEBTORS' APPLICATION TO EMPLOY KPMG  
[DOCKET NO. 2171]**

1 High Speed Rail Authority and the California Air Resource Board, by and through its  
2 undersigned counsel, hereby file this objection to the *Application Pursuant to 11 U.S.C. §§*  
3 *327(a) and 328(a) and Fed. R. Bankr. P. 2014(a) and 2016 For Authority to Retain and Employ*  
4 *KPMG LLP as Information Technology, Risk and Legal Support Consultants to the Debtors Nunc*  
5 *Pro Tunc to Petition Date*. This Objection is supported by the following memorandum of points  
6 and authorities and any argument the Court may permit.

7 **PRELIMINARY STATEMENT**

8 High Speed Rail Authority's ("HSRA") mission is to build and maintain an electric, high-  
9 speed, rail system in the State of California. KPMG LLP ("KPMG") currently provides financial  
10 advisor services to HSRA under a \$40 million, four-year contract that terminates June 14, 2020.  
11 Due to its work for HSRA, KPMG has an actual and potential conflict. Currently, KPMG  
12 provides for all of HSRA's accounting and financial planning needs, and includes the following  
13 services:

- 14 a. Coordinates funding requests and assists in the production of funding  
15 requests;
- 16 b. Provides financial analysis of all bidders in HSRA's procurement process  
17 to determine whether bidders are financially qualified;
- 18 c. Preparing financial statements for HSRA's board of directors.

19 In the future, HSRA will purchase electricity from Pacific Gas & Electric Company (the  
20 "Utility"), either directly or indirectly but through PG&E's grid system. HSRA therefore  
21 anticipates entering into long-term energy purchasing agreements with PG&E. HSRA will rely on  
22 KPMG for advice when it drafts and negotiates those contracts with PG&E.

23 The California Air Resources Board ("CARB") is charged with protecting the public from  
24 the harmful effects of air pollution and developing programs and actions to fight climate change.  
25 CARB designed and implements the Cap-and-Trade Program, a market-based regulation that  
26 reduces greenhouse gas emissions from the State's major emission sources. The Cap-and-Trade  
27 Program establishes a hard, declining cap on approximately 80 percent of total statewide  
28 emissions, and it creates a strong economic incentive for investments in cleaner, more efficient

1 technologies. There are no facility-specific emissions reduction requirements; rather, each  
2 covered entity must acquire and surrender compliance instruments in an amount equal to its total  
3 covered emissions. A market exists where compliance instruments may be sold and traded  
4 among Program participants.

5 Between March 1, 2010, and August 31, 2012, KPMG provided CARB with information  
6 technology planning and support, project planning and management, risk management support,  
7 and other services in support of CARB's development of a cap-and-trade market tracking system.  
8 This tracking system – known as the Compliance Instrument Tracking System Service (CITSS) –  
9 allows CARB to track regulated entities' cap-and-trade trading and compliance activities. As a  
10 regulated entity, the Utility is a market participant in the Cap-and-Trade Program and utilizes  
11 CITSS to hold and surrender compliance instruments and to participate in transactions of  
12 compliance instruments with other market participants. Although KPMG concluded its work for  
13 CARB nearly seven years ago, KPMG acquired confidential and sensitive information regarding  
14 the Cap-and-Trade Program from CARB and was directly involved in the preliminary  
15 development of the cap-and-trade market tracking system. CARB regulates the Utility, and the  
16 Utility is a registered user in the cap-and-trade market tracking system.

## 17 BACKGROUND

18 1. On January 29, 2019 (the "Petition Date"), the Debtors commenced the above  
19 captioned cases by filing voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.  
20 *See* ECF No. 1.

21 2. On May 21, 2019, the Debtors filed the Application to Retain and Employ KPMG.  
22 *See* ECF No. 2171.

23 3. As disclosed in the Application and related declaration of Geno Armstrong (ECF No.  
24 2172), KPMG would provide information technology, risk and legal support consulting services,  
25 asset management services, data security services, and legal support services. KPMG may  
26 provide additional services and seek separate retention orders with regard to any additional  
27 services.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. LEGAL FRAMEWORK

11 U.S.C. section 327 governs employment of professionals. Section 327(a) requires employment of “disinterested persons” and section 327(c) requires disqualification if a creditor objects and there is an “actual conflict of interest”. Whether an actual conflict of interest exists is a case- and fact-specific inquiry. *In re AFI Holding, Inc.*, 530 F.3d 832, 848 (9th Cir. 2008).

“‘Actual’ conflict occurs when the professional serves two presently competing and adverse interests.” *In re Am. Printers & Lithographers, Inc.*, 148 B.R. 862, 866 (Bankr. N.D. Ill. 1992).

“‘Potential’ conflict is said to occur where the competition does not presently exist, but may become active if certain contingencies arise.” *Id.* “There is a trend to make no distinction between potential and actual conflicts.” *In re AFI Holding, Inc.*, 530 F.3d 832, 843 n.5 (9th Cir. 2008).

### II. ARGUMENT

#### A. The Application Should Be Denied Because KPMG Has an Actual and Potential Conflict of Interest.

An actual conflict may arise when dual representation creates a conflict of interest. *See In re Internet In a Mall, Inc.*, 216 F.3d 1083 (9th Cir. 2000). Here, KPMG would have an actual and potential conflict of interest if it provides information technology, risk and legal support consulting services, asset management services, data security services, and legal support services to the Debtors. KPMG concurrently provides financial services to HSRA, a creditor in this bankruptcy case with two active contracts with PG&E for \$27 million and \$36 million, respectively. These contracts contain a requirement to reconcile payments with true costs, which may lead to a claim. The types of services that KPMG would provide to PG&E could easily fall within the scope of these contracts, in which case KPMG would have a dual representation of both PG&E and HSRA.

In addition, KPMG would have a potential conflict of interest because, in the future, a major component of HSRA’s objective will be to obtain electricity from PG&E to operate the high-speed rail. The parties will need to enter into long-term contracts between HSRA and PG&E. And because of the unique nature of the future contracts—this project will be the state’s

1 first high-speed rail—market rates and terms for the contracts will likely not be readily  
2 ascertainable. HSRA will therefore heavily rely on KPMG’s financial advice in negotiating and  
3 drafting these contracts. And again, KPMG would find itself on both sides of the negotiating  
4 table.

5 Although KPMG’s work on CARB’s cap-and-trade market tracking system ended in  
6 August 2012, a potential conflict still exists because KPMG helped with the initial development  
7 of the market system in which the Utility is an active participant. KPMG also acquired  
8 confidential and sensitive program information from CARB. Thus, having done work for the  
9 regulator and now proposing to do work for the regulated entity, KPMG may find itself in a  
10 situation that could lead to the disclosure of CARB’s confidential program information to the  
11 Utility, which raises the prospect of a conflict of interest.

12 **B. Alternatively, the Court Should Impose an Ethical Wall.**

13 In the alternative, if the Court does not deny the Debtors’ application to retain KPMG, the  
14 Court should require an ethical wall that would (a) prohibit KPMG from sharing any information  
15 about HSRA’s financials and CARB’s cap-and-trade program and market tracking system with  
16 Debtors and (b) prohibit the same KPMG personnel that currently work or previously worked for  
17 HSRA and CARB to ever work for PG&E either in this bankruptcy case, or in the future. The  
18 Court also should require that KPMG and the Debtors establish protocols to protect against  
19 disclosures of HSRA and CARB information.

20 Dated: June 4, 2019

Respectfully submitted,

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By: /s/ Paul J. Pascuzzi

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I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, Suite 1750, Sacramento, CA 95814. On June 4, 2019, I served the within documents:

By Electronic Service only via CM/ECF.

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